Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

SHARON MACY,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent,

On Petition for a Writ of Certiorari to the Kentucky Supreme Court

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PETITION FOR WRIT OF CERTIORARI

C. Mike Moulton
Moulton & Long PLLC
58 Public Square
Elizabethtown, KY 42701
(270) 766-1800
Counsel for Petitioner, Sharon Macy

QUESTIONS PRESENTED FOR REVIEW

Sharon Macy, a school teacher, was convicted of nine (9) counts of Terroristic Threatening involving some of her students. Subsequent to her conviction, Macy became aware of newly discovered evidence which would have assisted greatly in her defense and also discovered there may have been exculpating evidence not provided by the Commonwealth. Macy filed motions to set aside her judgment and for a new trial, all of which were denied by the trial court and the subsequent appellate courts.

The questions presented are:

I. **Was the Hopkins District Court's summary denial of Macy's motions to set aside her judgment and grant a new trial, without holding an evidentiary hearing on the issue of her newly discovered evidence, and the subsequent denial of State Appellate relief, a violation of Macy's due process rights guaranteed under the Fourteenth Amendment to the United States Constitution?**

II. **Was the Hopkins District Court's summary denial of Macy's motions to set aside her judgment and grant a new trial, without holding an evidentiary hearing on the issue whether the Commonwealth failed to provide exculpatory evidence, and the subsequent denial of State Appellate relief, a violation of Macy's due process rights guaranteed under the Fourteenth Amendment to the United States Constitution?**

PARTIES TO THE PROCEEDINGS

Petitioner: Sharon Macy

Respondent: The Commonwealth of Kentucky

CORPORATE DISCLOSURE STATEMENT

The Petitioner is an individual. There are no corporations or publicly held companies that own 10 percent or more of the stock represented by in this case.

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS

Judgment of the:

Kentucky Supreme Court	
2003-SC-809-D	
Sharon Macy,	Movant
v.	
Commonwealth of Kentucky	Respondent
Kentucky Court of Appeals	
2003-CA-001212-DR	
Sharon Macy,	Movant
v.	
Commonwealth of Kentucky	Respondent
Hopkins Circuit Court	
02-XX-00010	
Sharon Macy,	Appellant
v.	
Commonwealth of Kentucky	Appellee
Hopkins District Court	
00-M-01792	
Commonwealth of Kentucky	Plaintiff
v.	
Sharon Macy	Defendant

STATEMENT OF JURISDICTION

On February 11, 2004, the Supreme Court of Kentucky, case number 2003-SC-809-D, denied discretionary review of the decision of the Kentucky Court of Appeals. A copy of that order is attached in the appendix as exhibit APP. Page 1. On September 12, 2003, the Kentucky Court of Appeals, case number 2003-CA-001212-DR denied discretionary review of the decision of the Hopkins Circuit Court. A copy of that order is attached in the appendix as exhibit APP. Page 2. On May 14, 2003, the Hopkins Circuit Court, Judge Charles W. Boteler, Jr. presiding, entered an Opinion and Order Affirming the ruling of the Hopkins District Court. A copy of that order is attached in the appendix as exhibit APP. Page 3-5. That order resulted from an appeal of the Hopkins District Court's ruling on post judgment relief. A copy of that appeal is attached in the appendix as exhibit APP. Page 6-16 On November 22, 2002, the Hopkins District Court, Judge Carl Hurst presiding, entered an order denying all of Sharon Macy's motions to set aside her judgment and for a new trial, based on reasons orally explained in the record. A modified copy of that order is attached in the appendix as exhibit APP. Page 17 and the transcript of the hearing upon which Judge Hurst founded his decision is attached in the appendix as exhibit APP. 18-24. The motions to set aside Sharon Macy's judgment and grant a new trial resulted from newly discovered evidence uncovered after her April 5, 2001 convictions in Hopkins District Court for nine (9) counts of Terroristic Threatening, all misdemeanors. (None of the Orders and Opinions were published in any official reporter.)

The jurisdiction of the Supreme Court of the Unites States is conferred by 28, U.S.C. 1257(3) and rules 10(c) *et seq*. and 13(1) *et seq*. of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KRS 508.080 Terroristic Threatening; 3rd Degree

(1) Except as provided in KRS 508.075 or KRS 508.078, a person is guilty of terroristic threatening in the third degree when:

(a) He threatens to commit any crime likely to result in death or serious physical injury to another person or likely to result in substantial property damage to another person; or

(b) He intentionally makes false statements for the purpose of causing evacuation of a building, place of assembly, or facility of public transportation.

(2) Terroristic threatening in the third degree is a Class A misdemeanor.

Kentucky Rules of Criminal Procedure (RCr) Rule 10.02

(1) Upon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice. If trial was by the court without a jury, the court may vacate the

judgment, take additional testimony and direct the entry of a new judgment.
(2) Not later than ten (10) days after return of the verdict, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a defendant, and in the order shall specify the grounds therefore.

Kentucky Rules of Criminal Procedure (RCr) Rule 10.06
(1) The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits.
(2) After a motion for a new trial is filed and if there is an appeal pending, either party may move the appellate court for a stay of the proceedings in the appellate court, whereupon the clerk of the appellate court shall notify the clerk of the trial court that the motion has been filed. The clerk of the trial court shall notify the clerk of the appellate court of the trial court's ruling on the motion for a new trial.

Kentucky Rule of Civil Procedure CR 60.02 Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.
On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has

been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

STATEMENT OF THE CASE

Material Facts and Procedural History

Petitioner Sharon Macy (hereinafter "Macy") was a high school teacher at South Hopkins Middle School. On November 1, 2000, Macy was leaving the school grounds of South Hopkins Middle School after her work day was complete when she found members of the Boys Basketball Team sitting outside of the school without supervision. Macy instructed the boys to go back inside the school's gymnasium. At that time, she was informed by the school's custodian, Charles Camplin, that the boys had been disrespectful to members of the Girls Basketball Team which had been practicing in the gymnasium. Macy lectured the boys about their actions, after which Macy left the school grounds. The nine (9) boys to whom Macy spoke later claimed Macy threatened to kill them on two separate occasions during her lecture. A criminal complaint was taken by one of the boy's parents and Macy was charged with nine counts of Terroristic Threatening.[1] A trial was held in Hopkins District Court on April 4 and 5, 2001 at which time a Hopkins County jury found Macy guilty of nine counts of terroristic threatening. The jury recommended a fine of five hundred dollars ($500.00) on each count. The fine was

[1] Terroristic Threatening is a class A misdemeanor punishable by imprisonment of up to 12 months in the County Jail and/or a $500.00 fine. KRS 532.020; 500.080

suspended and Macy was placed on probation for a period of two years.

The testimony of two of the nine boys allegedly threatened by Macy, Trevor Duncan and Albert Jackson, later became an issue. The boys were members of the boy's basketball team at South Hopkins Middle School. Both testified at the criminal trial. Albert Jackson testified, "a little into the conversation, she (referring to Macy) told us that if we was picking on the girls or teasing or like that, she would kill us because we — we're always the ones that talk about the girls; and — that we were the ones who were always talking about the girls, and she was getting tired of it." Albert Jackson also testified Macy made the threat on two occasions and that he took Macy seriously. On cross-examination Albert Jackson gave conflicting testimony when he stated, "But, I don't remember her saying she was going to kill us — five kids or whatever. I don't remember her saying that specifically. But I remember her saying other stuff." Trevor Duncan, testified that, "She said that she would kill us if we made fun of the girls." At the criminal trial, Trevor Duncan denied telling others that he in fact did not hear any death threats from Macy.

The convictions were appealed to the Hopkins Circuit Court, case no. 01-XX-0002, by Macy's attorney at that time, C. Mark Blankenship. The Circuit Court affirmed the convictions. Blankenship then filed a motion for Discretionary Review of the Circuit Courts affirmation of the conviction to the Kentucky Court of Appeals, case no. 2002-CA-46. That motion was denied on March 22, 2003. Precipitated by newly discovered evidence, two post conviction motions were later filed in the Hopkins District Court. A Kentucky Rule of Criminal Procedure CRr. 11.42[2]

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[2] RCr. 11.42 is entitled Motion to set aside or correct sentence. Since Macy was only fined and RCr. Relief is only available to persons who are in custody or on probation, parole or conditional discharge, this relief was not technically available to Macy. However, the same issues involved in the RCr. 11.42 motion are applicable to the CR 60.02 styled motion described below.

motion, styled as a "Motion To Set Aside Judgment", was filed by C. Mark Blankenship on behalf of Macy on or about September 10, 2002. On or about November 13, 2002, a Motion For New Trial was filed on Macy's behalf by another attorney, W. David Rye.

Rye's motion, while not brought under a specific Rule of Criminal Procedure, amounted to a request for new trial under RCr 10.02, RCr. 10.06 and CR 60.02. As stated, Blankenship mistakenly styled his Motion to Set Aside Judgment as a motion filed pursuant to RCr 11.42 although its applicability applies and survives under CR 60.02 as well. The argument in both motions was that new evidence had been discovered since the trial that would tend to exculpate the Macy, and, Blankenship's RCr. 11.42 motion also alleged that the Commonwealth failed to disclose potentially exculpatory evidence. This evidence was in the form of notes taken by, and in the possession of, an Assistant School Superintendent. These notes were later destroyed.

Both Rye and Blankenship tendered to the District Court, and relied on, an Affidavit of Kendra Young in which she stated Albert Jackson, one of the witnesses against Macy at the criminal trial, informed Young he was not present at the time Macy made the alleged threats. Responding to a question of whether or not Albert Jackson stated the events ever happened, Young said, "he didn't say that it didn't, he is just saying that, because he, like, he wasn't there, he, like, he wasn't even in the gym or anything when all of it happened, he said." When questioned further, Young stated Albert Jackson told her he was not in the gym on the day that Macy was allegedly accused of threatening to kill nine students. Young, who was not a witness at the criminal trial, provided her Affidavit on August 7, 2002.

Rye, in support of his motion, also put before the District Court the Affidavit of Cassi Ezell. Ezell's affidavit concerned Trevor Duncan, another witness whose testimony is discussed above. Ezell stated Trevor Duncan stated he never heard Macy utter the alleged death threats and that he did not think the issue surrounding the death threats allegedly

made by Macy would be going on this long. Ezell, who was not a witness at the criminal trial, provided her Affidavit on October 8, 2002.

Both motions were briefed and a hearing was held in front of District Court Judge Carl Hurst on November 22, 2002. (APP. 7-14) After the hearing, at which no witnesses were allowed or called, no evidentiary hearing held and the Commonwealth did not participate, Judge Hurst denied both motions on grounds "explained on the record." (APP. Page 17-24) That denial resulted in an appeal being filed in Hopkins Circuit Court. (APP. Pages 1-16) In the appeal motion, counsel addressed the issue of fairness of the trial and the consequences of failing to provide exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2nd 215 (1963) (APP. Pages 10-13) Oral arguments were heard in the case on May 2, 2003 at which time counsel pointed the Circuit Court to *Commonwealth v. Gilpin*, 777 S.W.2d 603, 606 (1989) in arguing that failing to provide an evidentiary hearing on the issues of newly discovered evidence and failure of the Commonwealth to provide exculpatory evidence rose to the level of constitutional error which is presumed to be prejudicial unless harmless. The Circuit Court affirmed the decision of the District Court on May 14, 2003. (APP. Page 3-5) A motion for Discretionary Review was filed in the Kentucky Court of Appeals and was subsequently denied. (APP. Page 2) A motion for Discretionary Review of the Court of Appeals Opinion and Order was then filed in the Kentucky Supreme Court. (APP. Pages 25-33) That motion for Discretionary Review addressed the arguments made in the lower courts including the failure of the trial court to hold an evidentiary hearing on the newly discovered evidence issue and the failure of the Commonwealth to disclose exculpatory evidence. (APP. Pages 29-32) That motion for Discretionary Review was also denied and this motion follows. (APP. 1)

ARGUMENT

I. Was the Hopkins District Court's summary denial of Macy's motions to set aside her judgment and grant a new trial, without holding an evidentiary hearing on the issue of her newly discovered evidence, and the subsequent denial of State Appellate relief, a violation of Macy's due process rights guaranteed under the Fourteenth Amendment to the United States Constitution?

While this case is one where, at first blush, the only damage to Macy seems to be a probated fine, to Macy it is much more. Notwithstanding the fact that she believes she was wrongly accused and convicted of a crime, albeit a misdemeanor, her whole life was turned up side down. The ripples from the conviction go much further than the fine or the two years probation. Macy has lost her job and is battling to maintain her teaching certificate, without which she can no longer perform her chosen profession. For the Kentucky Court of Appeals and the Kentucky Supreme Court not to review the decisions of the Hopkins Circuit and District courts amounts to a manifest injustice. Macy should be allowed to explore every substantive and procedural avenue available to proof her innocence. Discretionary review at the state level should have been granted to ensure none of those avenues were prematurely closed to Macy.

Black's Law Dictionary, (7th ed. 1999) defines due process as "[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case." The 14th Amendment to the Constitution guarantees due process to the citizens of the United States and its States. While post judgment relief involving newly discovered evidence is not usually considered reviewable by the Federal Judiciary, "in some situations newly discovered

evidence is so compelling that it would be a violation of the 'fundamental fairness embodied in the Due Process Clause' not to afford a defendant a new trial at which the evidence could be considered." *Coogan v. McCaughtry*, 958 F.2d 793, 801 (7th Cir. 1992) citing *Walker v. Lockhart*, 763 F.2d 942, 961 (8th Cir. 1985) (en banc) (Arnold, J. concurring), *cert. denied*, 478 U.S. 1020, 106 S.Ct. 3332, 92 L.Ed.2d 738 (1986) It is axiomatic that, when presented with such evidence, the court "must give the new evidence some consideration to determine whether it is inherently credible and substantial enough to warrant a closer review." *Id.* In order to properly evaluate the new evidence, "[t]he guarantees of due process call for a 'hearing appropriate to the nature of the case.'" *United States v. Raddatz*, 447 U.S. 667, 677, 100 S.Ct. 2406, 2413, 65 L.Ed.2d 424 (1980) (citations omitted)

The appropriate hearing in Macy's case would have been an evidentiary hearing to determine how credible and substantial the new evidence was. Instead, the District Court held only a cursory bench hearing in which no witnesses were called and the Commonwealth did not even participate. The District Court Judge, having stated he read the affidavits filed with the Court, determined, based on those sterile affidavits and his own anecdotal reasoning, that such evidence was insufficient for him to bother with. (APP. Page 19-22) Such a summary conclusion on the part of the District Court Judge does not comport with the "flexible concepts of due process." *Id.* Even the Circuit Court, in its review of the Appeal of the District Court's decision, while admittedly speaking in terms of a hearing on the exculpatory evidence issue, felt an evidentiary hearing "would have made this issue clearer." (APP. Page 4)

Due process and the principles of fundamental fairness dictate that, at the very least, an evidentiary hearing on the newly discovered evidence should have been conducted by the Hopkins District Court. Not holding an evidentiary hearing appropriate to the nature of the case

violated Macy's right to the due process. The District Court's not properly evaluating the evidence to determine whether it was sufficiently compelling to grant a new trial, undermined the notion of fundamental fairness embodied in the 14th Amendment to the United States Constitution. At the very least, the Hopkins Circuit Court, the Kentucky Court of Appeals and the Kentucky Supreme Court should have remanded the case to the District Court with instructions to hold an evidentiary hearing and then provide appropriate findings of fact and conclusions of law. However, Macy believes the more appropriate remedy would have been for those courts to grant her motion for a new trial on this issue alone.

II. Was the Hopkins District Court's summary denial of Macy's motions to set aside her judgment and grant a new trial, without holding an evidentiary hearing on the issue whether the Commonwealth failed to provide exculpatory evidence, and the subsequent denial of State Appellate relief, a violation of Macy's due process rights guaranteed under the Fourteenth Amendment to the United States Constitution?

When this issue was presented to the Hopkins District Court on Macy's motion to set aside her judgment and grant a new trial, the Hopkins District Court Judge reasoned that since the information was not in the hands of the County Attorney, the Commonwealth's prosecuting representative, they had no responsibility in not providing the information. The Judge seemed to imply that since the school, who was in possession of the information, was not before the court, there was no basis for Macy even bringing the motion. (APP. Pages 22, 23)

As stated in the Circuit Court's Order affirming the decision of the District Court, "an evidentiary hearing would have made this issue clearer." (APP. Page 4) While the

Commonwealth may have addressed the issue in its pleadings stating they were not aware of the notes claimed to be exculpatory by Macy, the Circuit Court's appellate analysis begs the question. If exculpatory evidence is within the knowledge of an agent of the Commonwealth, the prosecuting authority is deemed to have knowledge of the information. *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *United States v. Argus,* 427 U.S. 150, 92 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) When exculpatory evidence is within the knowledge of an agent of the Commonwealth, it is contingent upon the prosecuting authority to disclose the information to the defendant. An evidentiary hearing would have helped resolve any questions concerning this issue and would also have been appropriate and helpful in addressing the motion pursuant to RCr. 10.02, RCr. 10.06 and CR 60.02.

Again, on this issue alone, the Circuit Court, and the subsequent reviewing State Courts, should, at the very least, have sent the matter back to the District Court for an evidentiary hearing or, more appropriately, instructed the District Court to grant a new trial.

THE IMPORTANCE OF REVIEW

The newly discovered evidence in this case was not disclosed until over a year after the trial. The newly discovered evidence involved perjured testimony of two of the primary witnesses to the prosecution of Macy. While *Foley v. Commonwealth,* Ky., 55 S.W.3d 809, 816 (2001) makes it clear that newly discovered evidence "which is only impeaching in nature" did not warrant a new trial, the evidence in this instance goes far beyond being merely impeachment. A major portion of Macy's defense at trial was to show collusion between the boys to manufacture testimony. Any affirmative evidence showing such collusion between the witnesses directly supported Macy's defense that the boys banded together to protect their basketball coach

from trouble due to his leaving them unsupervised. The newly discovered evidence supported Macy's defense that the scheme went further than the boys envisioned.

Evidence from disinterested witnesses supporting the theory of a defendant's otherwise unsupported defense, would likely result in a different verdict. In such cases, granting a new trial and allowing the presentation of newly discovered evidence is appropriate to assure justice and, conversely, to avoid manifest injustice. *Dolan v. Commonwealth,* Ky.App. 468 S.W.2d 277 (1971) At the very least, an evidentiary hearing should have been held to determine the validity and strength of the new evidence. The admission of an accuser, albeit to a third party, that he was not even present at the event, so strongly supports and corroborates Macy' s position of a testimonial conspiracy that it undoubtedly would have effected the outcome of the trial. As stated, an evidentiary hearing where the judge could directly evaluate the testimony is the only way to properly determine the newly discovered evidence's weight and probative impact. Not holding an evidentiary hearing on the matter denied Macy fundamental fairness and her right to due process under the Fourteenth Amendment to the United States Constitution.

A hearing should also have been granted in order to establish whether or not there was indeed exculpatory evidence, the significance of that evidence, the propriety of the actions of destroying the evidence and, most importantly, to evaluate the prejudicial effect of the failure to produce the evidence. The denial of the evidence rises to the level of a "constitutional error of the first magnitude and no showing of want of prejudice would cure it." *Commonwealth v. Gilpin,* Ky.App., 777 S.W.2d 603, 606 (1989) citing *Davis v. Alaska,* 415 U.S. 308,318,94 S.Ct. 1105, 1111,39 L.Ed.2d 347, *355* (1974) "A constitutional error which contributes to conviction is presumed to be prejudicial unless it was harmless beyond doubt." *Gilpin* at 606, internal cites omitted Absent an evidentiary hearing, there was no way to determine the

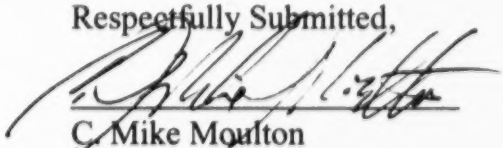
constitutional and prejudicial impact of the evidence. Macy believes the evidence would make a substantial difference in her case and believes it was error not to grant a new trial on this issue alone. At the very least, an evidentiary hearing should have been held.

This Court should grant Certiorari to correct the due process deprivations suffered by Macy as a result of the denial of evidentiary hearings. In granting Certiorari, this Court can clarify the requirements of evidentiary hearings involving newly discovered and exculpatory evidence.

CONCLUSION

Macy lost her teaching job as a result of the trial's outcome. She is now in an administrative battle to save her teaching certificate. While a fine or probation may be perceived to be minor in comparison to the penalty Macy could have received, the resulting impact on her life is huge. Macy contends there was collusion between the boys who testified against her in order to protect their basketball coach. She uncovered reliable and credible evidence which strongly supported her belief and would buttress her defense. Macy, without being afforded due process to which she is entitled, has being denied the opportunity to present that evidence. This Court has the opportunity to ensure Macy finally obtains the due process and fundamental fairness to which she is entitled. For the foregoing reasons, Macy respectfully requests this Court grant her Petition for Writ of Certiorari.

Respectfully Submitted,



C. Mike Moulton
Moulton & Long PLLC
58 Public Square
Elizabethtown, KY 42701
Tel. 270 766-1800
Counsel for Petitioner

APPENDIX

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Supreme Court of Kentucky

2003-SC-809-D
(2003-CA-1221-D)

SHARON MACY MOVANT

HOPKINS CIRCUIT COURT
2002-XX-1 0

V.

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for discretionary review of the decision of the Court of Appeals is denied.

ENTERED February 11, 2004.

s/ _____
Joseph E. Lambert
Chief Justice

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-001212-DR

SHARON MACY — MOVANT

ON MOTION FOR DISCRETIONARY REVIEW
APPEAL FROM HOPKINS CIRCUIT COURT
ACTION NO. 02—XX—00010

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER

*** *** *** ***

BEFORE: BUCKINGHAM, COMBS and HUDDLESTON[1], Judges.

Having considered the motion for discretionary review, the response thereto, and being otherwise sufficiently advised, the Court ORDERS that the motion be, and it is hereby, DENIED.

ENTERED: 9/12/03 s/ _____
DANIEL C. BUCKINGHAM
JUDGE, COURT OF APPEALS

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580

COMMONWEALTH OF KENTUCKY
HOPKINS CIRCUIT COURT
MADISONVILLE. KENTUCKY 42431
CASE NO. 00-M-0 1792
APPEAL NO. 02-XX-00010

SHARON MACY, APPELLANT,

VS. OPINION AND ORDER AFFIRMING

COMMONWEALTH OF KENTUCKY, APPELLEE.

This is an appeal from a hearing held November 22, 2002 by the Hopkins County District Court. Division I, the Honorable Judge Carl U. Hurst, presiding. The appellant requested that the District Court vacate her sentence and/or grant her a new trial on her criminal convictions. Said motions were denied by the District Court and this appeal followed. Appellant filed her notice on December 19, 2002 and Statement of Appeal on January 21 2003. Appellee filed its Counter-statement of Appeal on February 18, 2003.

The first issue on appeal is whether there is "new evidence" discovered after trial sufficient to warrant setting aside the judgment or to grant a new trial. The appellant has proffered the affidavits of two students, Kendra Young and Cassie Ezell, as evidence that two of the witnesses may have lied at trial. However, these two students were not present when the alleged incident took place. They simply state that two of the young men who testified against Ms. Macy at trial later told them that they were not present during the incident or that they did not hear her make the alleged statements.

While it is unfortunate that evidence from these students was not presented at trial, the defendant had ample opportunity to cross-examine the witnesses and the "newly discovered" evidence is being used only for impeachment purposes. Pursuant to Foley v. Commonwealth, 55 S.W.3d 809, 816 (Ky. 2000), "newly discovered evidence which

merely impeaches or is collateral is insufficient unless it impeaches the only material witness in the case." In the case before the Court, there were several witnesses who testified as to the incident involving the appellant. Additionally, there is no information presented that the incident did not occur, only that two of the witnesses later claimed that they were either not present at the time or did not hear the statements.

The second issue on appeal is whether the Commonwealth withheld potentially exculpatory evidence when they failed to disclose notes taken by the school board during their investigation, in violation of Brady v. Maryland, 373 U.S. 83 (1963). It is unclear to this Court that said evidence would have been exculpatory and therefore even fall within the parameters of the Brady decision. Even so, any investigation completed by the school board does not fall within the scope of an investigation done on behalf of the Commonwealth for purposes of criminal prosecution. Thus, unless the County Attorney's Office had specific knowledge of said notes relating to the school boards's (sic) investigation, they would not be required to disclose the same. They have no authority over the school board or any paperwork that they may have produced.

The appellant claims that there should have been an evidentiary hearing as to whether the County Attorney's Office had specific knowledge of the school board's notes. While this Court agrees that an evidentiary hearing would have made this issue clearer, the County Attorney's office specifically states in its pleadings that they were not aware of the investigation by the school board or any notes produced there from. Appellant has not offered any evidence or suggested any source of evidence to the contrary during the appellate process.

As such, this Court does not believe that the District Court abused its discretion when it denied the appellant's request to vacate her sentence and/or grant her a new trial on her criminal convictions. For the reasons stated herein, the Order of the District Court is AFFIRMED.

This the 14th day of May, 2003.

S/ _____

CHARLES W. BOTELER, JR.
JUDGE, HOPKINS CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
HOPKINS CIRCUIT COURT
CASE NO.02-XX-00010
(APPEAL FROM CASE NO. 0O-M-01792)

SHARON MACY, APPELLANT

V. STATEMENT OF APPEAL PURSUANT TO CR 72.10

COMMONWEALTH OF KENTUCKY, APPELLEE.

Comes the Appellant, Sharon Macy, by counsel, and for her Statement of Appeal pursuant to CR 72.10, states as follows:

1. The style of the case from which Appellant is appealing is Commonwealth of Kentucky, Plaintiff vs. Sharon Macy, Defendant, Criminal Case No. 00-M-0 1792, Hopkins District Court.

2. Appellant is currently represented by J. Foster Cotthoff, Cotthoff& Willen, 317 West Ninth Street, P.O. Box *536,* Hopkinsville, Kentucky 42241-0536, whose telephone number is (270) 885-9909. Appellant was previously represented in this matter by C. Mark Blankenship, 309 North Fourth Street, Murray, Kentucky 42071 and Honorable W. David Rye, Deatherage, Myers, Self& Lackey, 701 South Main Street, P.O. Box 1065, Hopkinsville, Kentucky 42241-1065. The Appellee in this matter, the Commonwealth of Kentucky, is represented by the Honorable Robert Moore, the Hopkins County Attorney, 25 East Center Street, Madisonville, Kentucky 42431.

3. The Honorable Carl Hurst, Hopkins District Judge presided over the November 22, 2002 hearing being appealed.

4. The Notice of Appeal filed by Appellant, Sharon Macy, was filed on December 19, 2002. No Cross-Appeal has been filed as of this date

5. This matter has been before the Hopkins Circuit Court on a previous occasion. Appellant originally appealed her criminal conviction as a matter of right to this Court. Appellant now appeals on other post conviction relief grounds. Further, an administrative matter (01 -CI-00 109) pertaining to the Appellant has been before this Court on a previous occasion. The administrative/civil matter contains similar facts to those found in the criminal case which is now being appealed. Appellant states that no reference to the previous records is necessary.

6. This Appeal stems from a hearing held on November 22, 2002 whereby Appellant, Sharon Macy, asked the Hopkins District Court to vacate her sentence and/or grant her a new trial with regards to her criminal convictions. The convictions came from an April 4-5, 2001 trial in which Ms. Macy, Appellant herein, was convicted of nine (9) counts of terroristic threatening.

7. The Appellant respectfully requests an oral argument before this Court.

8. For purposes of background, Appellant would like to refresh the Court of the facts of the underlying criminal trial. Appellant, Sharon Macy, was accused of threatening to kill nine (9) members of the South Hopkins Middle School Boys Basketball Team. On November 1, 2000, Appellant was leaving the school grounds of South Hopkins Middle School after her work day was complete when she found members of the Boys Basketball Team sitting outside of the school without supervision. Appellant told the boys to go back inside of the school's gymnasium. At that time, she was informed by the school's custodian, Charles Camplin, that the boys had been disrespectful to the Girls Basketball Team which had been practicing on the gym floor. Ms. Macy then proceeded to speak to the boys about their actions. After the brief lecture by Ms. Macy to the boys, Ms. Macy left the school grounds. The nine boys that Ms. Macy spoke to then claimed that Ms. Macy threatened to kill them on two separate occasions during her lecture. An

eventual criminal complaint was taken out by one of the boy's parents and Ms. Macy was charged with nine counts of terroristic threatening. A trial was held on April 4 and 5, 2001 at which time a Hopkins County jury found Ms. Macy guilty of nine counts of terroristic threatening.

9. Trevor Duncan and Albert Jackson were two of the boys who were allegedly threatened by Ms. Macy. Both of them testified at the criminal trial as such. Specifically, Albert Jackson stated, "a little into the conversation, she (referring to Ms. Macy) told us that if we was picking on the girls or teasing or like that, she would kill us because we — we're always the ones that talk about the girls; and — that we were the ones who were always talking about the girls, and she was getting tired of it." (Transcript of Criminal Trial, Page 145 -146). Albert Jackson went on to say that she made the threat on two occasions and that he took her seriously. (Transcript of Criminal Trial, Page 146). It should be noted that upon cross-examination, Albert Jackson gave conflicting testimony when he stated, "But, I don't remember her saying she was going to kill us — five kids or whatever. I don't remember her saying that specifically. But I remember her saying other stuff" (Transcript of Criminal Trial, Page 156).

10. Trevor Duncan, another member of the Boys Basketball Team at South Hopkins Middle School, testified that, "She said that she would kill us if we made fun of the girls." (Transcript of Criminal Trial, Page 232). At the criminal trial, Trevor Duncan denied telling others that he in fact that he did not hear any death threats from Ms. Macy. (Transcript of Criminal Trial, Page 231).

11. Attached hereto as Exhibit A is a transcript of the Hearing heard by District Court Judge Carl Hurst on November 12, 2002. The above-referenced hearing was with regards to a Motion for New Trial filed on behalf of Appellant by the Honorable W. David Rye (Motion attached hereto as Exhibit B) and a Motion to Set Aside Judgment filed by the Honorable C. Mark Blankenship, on behalf of

Appellant, Sharon Macy (Attached hereto as Exhibit C). Mr. Rye's motion, although not specifically styled under a specific Rule of Criminal Procedure, amounted to a request for new trial under RCr 10.02 and 10.06. Mr. Blankenship styled his Motion to Set Aside Judgment as a motion filed under RCr 11.42. The main point of these motions was that new evidence had been discovered since the original trial that would tend to exculpate the Defendant. Specifically, both Mr. Rye and Mr. Blankenship tendered the Affidavit of Kendra Young. Ms. Young stated in her Affidavit that Albert Jackson, one of the witnesses against Ms. Macy at the criminal trial, had informed Ms. Young that he was actually not present at the time Ms. Macy made the alleged threats. Responding to a question as to whether or not Mr. Jackson stated the events never happened, Ms. Young said, "he didn't say that it didn't, he is just saying that, because he, like, he wasn't there, he, like, he wasn't even in the gym or anything when all of it happened, he said." (Affidavit of Kendra Young, Page 6, attached to both Exhibits B and C). When further pressed on the issue, Ms. Young specifically stated that Mr. Jackson had told her that he was not in the gym on the day that Ms. Macy was allegedly accused of threatening to kill nine students. (Affidavit of Kendra Young, Page 7, attached Exhibits B and C). Miss Young, who was not a witness at the criminal trial, gave her Affidavit on August 7, 2002.

Mr. Rye also put before the Court the Affidavit of Cassi Ezell. Ms. Ezell stated that she had had a conversation with Trevor Duncan, one of the witnesses against Ms. Macy. Cassi Ezell stated that Trevor Duncan had said that he never heard Ms. Macy say the alleged death threats and that he did not think that the issue surrounding the death threats allegedly made by Ms. Macy would be going on this long. (Affidavit of Cassi Ezell, Page 6, Attached to Exhibit B). Miss EzelI, who was not a witness at the criminal trial, gave her Affidavit on October 8, 2002.

Upon being presented with the above evidence at the

November 22, 2002 hearing, Judge Carl Hurst categorically denied both motions based on the new found evidence. It should be noted that no witnesses were heard, other than what was presented in Affidavit form, and the Commonwealth of Kentucky did not participate in the hearing whatsoever.

RCr 10.06 (1) states that the Motion for new trial shall be served not later than five *(5)* days after return of the verdict. A Motion for a new trial based upon newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the Court for good cause so permits.

Judge Hurst did not deny the motion filed by Mr. Rye for failing to be filed within one (1) year after the entry of the judgment. As stated earlier, the trial was held on April 4 and *5,* 2001 and Mr. Rye's Motion for New Trial was filed more than one (1) year after that judgment. However, it appears from the Affidavits tendered herein that the statements of Trevor Duncan and Albert Jackson made to Cassie Ezell and Kendra Young were not made until sometime after the trial had been over. Therefore, Appellant does in deed have good cause to file a Motion more than one (1) year after the entry of the judgment. As Judge Hurst did not rule to the contrary, it is Appellant's contention that this Appeal must go forward as timely under RCr 10.06.

RCr 10.02 permits a trial court to grant a new trial for any cause which prevented the Defendant from having a fair trial or if required in the interest of justice. See RCr 10.02(1). In the present case, two witnesses have been uncovered who clearly indicate that two of the witnesses against Ms. Macy lied on the stand. One of the witnesses, Albert Jackson, stated that he was not present at the time the alleged threats were made. The other witness, Trevor Duncan, stated that Ms. Macy did not say that she would kill anybody and that he did not believe that the events surrounding
Ms. Macy would go on that long. "Newly discovered evidence 'must be of such decisive value or force that it

would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.' *Coots v. Commonwealth, Ky.*, 418 S.W. 2d *752*, 754 (1967)." *Collins v. Commonwealth, Ky.*, 951 S.W. 2d 569, *576* (1997). In the present case, two witnesses who have provided sworn affidavits state that two of the key witnesses against Ms. Macy have admitted they lied on the stand. Clearly, this evidence is of such decisive value or force that it would probably change the result of Ms. Macy's trial if a new trial were held. Again, Ms. Macy did not have this evidence to present at trial as they boys had not yet contradicted their stories. This newly discovered evidence is clearly the type of evidence that lends great doubt to the integrity of the verdict. Therefore a new trial is required so that a jury can hear all relevant evidence pertaining to Ms. Macy's case.

11. (sic) "Whether to grant a new trial on the basis of newly discovered evidence is largely within the discretion of the trial court, and the standard of review is whether there has been an abuse of that discretion." *Foley v. Commonwealth, Ky.* 55 S.W. 2d 809, 814 (2001). In the present case, Judge Hurst did not hold a true hearing on the matter. He read through the Motions and Affidavits and summarily denied them. His rationale for denying the Motions was:

> "You have a statement that a person who was a witness has told a third party who was not a witness. That's something different than what was in their story and testimony in court. They may have told that person that simply because they didn't want to be bothered. They make up all kinds of reasons to make that statement. But an affidavit from a third person outside Court about someone told them inconsistent to sworn testimony offered in Court, this Court doesn't

> believe that that's grounds to grant a motion to either set aside the judgment or a motion for a new trial. Secondly, these witnesses were unable ... in the affidavits while they weren't interviewed until maybe this year, they were alive and kicking around then. So it is not evidence that would have been available at the time; it is just evidence that someone didn't dig up at that time. If we didn't shut the door on digging up evidence, cases would never be closed because things are always falling out of the woodwork in cases like these." (Exhibit A, Page 4 and 5)

As this Court can see, Judge Hurst declined to give any weight to the Affidavits despite the facts that they included statements that people had lied on the stand. He instead chose to disregard the Affidavits entirely. Further, he stated that the girls could have testified at the trial with regards to what they know. However, it appears from their Affidavits that they did not in fact know what they have sworn to until well after the trial. Both Mr. Jackson and Mr. Duncan did not make their statements to Ms. Young and Ms. Ezell until well after the trial had occurred. Therefore, they would not have known about the contradictory evidence. Clearly, Judge Hurst has abused his discretion by ruling in the above manner and by not having a more thorough hearing on the matter. Based on the abuse of discretion, this Court must reverse Judge Hurst's ruling by not having a new trial.

As stated above, Honorable C. Mark Blankenship filed a companion motion to Mr. Rye's RCr 10.02 Motion in which he asked the District Court to vacate Ms. Macy's conviction under RCr 11.42. RCr 11.42(1) states as follows:

> A prisoner in custody under sentence or a Defendant on probation, parole or conditional discharge who claims the

> right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the Court that imposed the sentence to vacate, set aside or correct it.

Mr. Blankenship's RCr 11.42 Motion on behalf of Ms Macy argued two reasons for the District Court to vacate Ms. Macy's sentence and conviction: (1) the newly discovered evidence in the form of Kendra Young's Affidavit that tends to prove Albert Jackson's testimony at trial was false; (2) discovery violations by the Commonwealth of Kentucky. As undersigned counsel has gone over Albert Jackson's testimony situation at length above, that area will not be recited again. Mr. Blankenship's Motion states "the conviction should also be set aside due to the failure of the Commonwealth and its governmental agency herein, i.e. Hopkins County Schools, to disclose potentially exculpatory evidence" (See Exhibit C, Page 2). At issue are extensive notes taken by Linda Zellich, Assistant Superintendent of the Hopkins County Schools, regarding interviews done by the Hopkins County Schools with the nine boys allegedly threatened by Ms. Macy. According to the Hopkins County Schools, the notes were destroyed. As the Court well knows, *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2nd 215 (1963) requires the prosecution to disclose exculpatory information to the Defense. If the prosecution in this case, the County Attorney's Office of Hopkins County, knew of these witness statements, or had seen them, they would have been under a duty to disclose them to the defense. At the hearing on November 22, 2002, the Commonwealth of Kentucky did not participate in the hearing and therefore neither admitted nor denied that they had access to the notes in question. Therefore, a hearing should be held to determine whether or not the Commonwealth of Kentucky via the Hopkins County

Attorney's Office had access to these notes.

The failure of the Hopkins District Court to vacate Appellant's conviction based on the above arguments is an abuse of discretion that must be reversed by this Court. At the very least, an evidentiary hearing should have been held in the Hopkins District Court regarding the charges set forth in both the RCr 11.42 Motion and the RCr 10.02 Motion.

Appellant herein, Sharon Macy, states that she is either entitled to her conviction being vacated under the RCr 11.42 Motion or a new trial under the RCr 10.02 Motion. In the alternative, Ms. Macy requests an Evidentiary Hearing in the Hopkins District Court or in this Court for the reasons stated above.

This 21st day of January, 2003.

S/ J. Foster Cotthoff
COTTHOFF & WILLEN
3 17 West Ninth Street
P.0. Box 536
Hopkinsville, KY 42241-536
(270) 885-9909
Counsel for Appellant, Sharon Macy

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing was served by mailing a true and exact copy of same to:

Honorable Robert Moore
Hopkins County Attorney
Courthouse Annex
25 E. Center Street
Madisonville, Kentucky 42431

Honorable David Massamore
Hopkins County Commonwealth Attorney
52 E. Broadway
Madisonville, Kentucky 42431

Dated, this the 21st day of January, 2003.

(The documents referred by reference to in this motion have not been included.)

COMMONWEALTH OF KENTUCKY
HOPKINS DISTRICT COURT
MADISONVILLE KENTUCKY
CASE NUMBER 00-M-01792

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. ORDER DENYING MOTIONS TO SETA SIDE JUDGMENT AND FOR A NEW TRIAL

SHARON MACY DEFENDANT

All motions to set aside judgment and for new trial are denied for reasons explained on the record.

Entered November 22, 2002

S/ _____
CARL HURST
DISTRICT COURT JUDGE

COMMONWEALTH OF KENTUCKY
FOURTH JUDICIAL CIRCUIT
HOPKINS DISTRICT COURT
CASE NO. 02-D-142 (sic)

COMMONWEALTH OF KENTUCKY, PLAINTIFF,

VS. **PRELIMINARY HEARING**

SHARON MACY, DEFENDANT.

The following is a preliminary hearing held at Hopkins District Court, Hopkins County Courthouse, Madisonville, Kentucky, before Honorable Carl U. Hurst, District Judge on Friday, November 22, 2002, at 9:00 a.m.

This transcript is not certified as to accuracy of content, as no court reporter was present in person, and same is produced from a taped recording of the hearing.

APPEARANCES

FOR THE DEFENDANT: Hon. C. Mark Blankenship
309 North Main Street
Murray, KY 42071

Hon. W. David Rye
Deatherage, Myers, Self
Lackey
P.0. Box 1065
Hopkinsville, KY 42241-1065

SHEILA BURTON
Court Reporter
POST OFFICE BOX 1357
HOPKINSVILLE. KY 42241-1357
PHONE: 270-886-6651 • FAX: 270-886-3008

JUDGE HURST: A motion to set aside judgment?
MR. BLANKENSHIP: Yes sir, it's an 1142 motion and I think the two motions before you are complimentary. Mr. Rye had some evidence that I didn't have when I filed that. I think his evidence would support my motion as well to set it aside based upon a fraud of the proceedings. One of the young men that testified against Ms. Macy--
JUDGE HURST: I've read it.
MR. BLANKENSHIP: Oh, you've read it? Okay.
JUDGE HURST: Let me ask a question about this so I can maybe shortcut this and make sure I understand. The affidavits are from, in your case, this _____ affidavit from a Kendra Young,- -
MR. BLANKENSHIP: Correct, Your Honor.
JUDGE HURST: She was not a witness in this case?
MR. BLANKENSHIP: No.
JUDGE HURST: And in essence, her affidavit states that one of the witnesses in the case told her something contrary to what he may have said in court?
MR. BLANKENSHIP: Right, he wasn't there.
JUDGE HURST: Okay, okay. And that's the basis of your motion to set aside a judgment, the first--
MR. BLANKENSHIP: The first ground. The second ground as to

1 the discovery.
2 JUDGE HURST: And your motion-- Mr. Rye, is that right?
3 MR. RYE: Yes, Your Honor. And I also have the affidavit
4 of the same--
5 JUDGE HURST: The same affidavit?
6 MR. RYE: Yes, and I also have an additional one in there
7 from a lady by the name of Cass Ezell.
8 JUDGE HURST: And Cass Ezell was not a witness?
9 MR. RYE: She was not a witness in the original
10 proceeding.
11 JUDGE HURST: And is her affidavit and testimony
12 basically that some witness in the initial proceeding has
13 told her something different than what they
14 testified to?
15 JUDGE HURST: Yes.
16 MR. RYE: Her affidavit, I believe, says that he informed
17 her that he was totally _____ at the trial
18 but he was there and heard what was said and
19 saw _____ several conversations that he
20 wasn't even in the gym that day, he wasn't even
21 there.
22 JUDGE HURST: To wrap this up, to pull this up sort of
23 together, but that basis for the request. The
24 motions, the affidavits are representing to the
25 court hearsay evidence. Someone else was a

witness supposedly since told me a _____ And I had a murder case in eastern Kentucky one time and he interviewed someone that told him during the course of the interview that they were there and saw the fella and the fella didn't shoot anyone. He called him for his star witness and went to the witness stand and swore him in and the first question asked him was he there, yeah; did you see my defendant shoot anyone and he said yeah. He, said what do you mean yes; he said yes I saw him shoot the victim and kill him. He said well I interviewed you and you said that you didn't see that but he said yeah but I was telling them, I'm swearing now. You understand? You have a statement that a person who was a witness has told a third party he was not a witness. That's something different than what was in their story and testimony in court. They may have told that person that simply because they didn't want to be bothered. They make up all kinds of reasons to make that statement. But an affidavit from a third person outside court about what someone told them inconsistent to sworn testimony offered in

court, this court doesn't believe that that's grounds to grant a motion to either set aside the judgment o[illegible] motion for a new trial. Secondly, these witnesses were unable-- In the affidavits, while they weren't interviewed maybe until this year, they were alive and kicking around then. So it's not evidence that would have been available at the time; it's just evidence that someone didn't dig up at that time. If we didn't shut the door on digging up evidence, cases would never be closed because things are always falling out of the woodwork in cases like these.

MS. MACY: But there was an investigation on my part.

JUDGE HURST: Well on that basis, I'm denying a motion to set aside the judgment. Is your motion for a new trial based solely on that circumstantial——

MR. BLANKENSHIP: It is, Your Honor. And our position would that these witnesses had testified at trial and made statements and we would ask for a new trial _____ to let a jury hear what they were told by the people who say they were there. It would contradict exactly what they said at trial.

MS. MACY: And the board of education has admitted-

1 JUDGE HURST: Motion denied.
2 MS. MACY: Sir, this is my life. Please, this is my life.
3 I've never done anything wrong in my life.
4JUDGE HURST: In all due respect, Ms. Macy, you've got two
5 attorneys up here. They're the only ones that
6 need to be addressing this court.
7 MS. MACY: Okay, but you're not wanting to listen to the
8 facts.
9 JUDGE HURST: Please have a seat, Mr. Macy. Please.
10 MS. MACY: The truth will come out.
11 JUDGE HURST: The motion for a new trial, Mr. Rye, is denied.
12 The motion to set aside the judgment is denied.
12 On your second basis was that the Hopkins
14 County school failed to disclose—— Well, they
15 weren't under discovery.
16 MR. BLANKENSHIP: Well the discovery order dealt with both the
17 Commonwealth and government agencies and that
18 is a government agency.
19 JUDGE HURST: If the Commonwealth didn't have access to any
20 information that the school had, the
21 Commonwealth had no information to turn over to
22 you. Now if you believe that the school
23 actually withheld something—-
24 MR. BLANKENSHIP: They destroyed–
25 JUDGE HURST: Well I think there are other avenues of relief

for that.
MR. BLANKENSHIP: How would it affect their criminal condition though, you know? The other avenues wouldn't be the release of——
JUDGE HURST: The school is not before the court.
MR. BLANKENSHIP: Well, yes, I think it was through the Commonwealth.
JUDGE HURST: They were not. That motion is denied. And, again, I'm sympathetic for the repercussions on this but we went through a trial. We had discovery before trial, we had several witnesses and the jurors made the decision as to the facts, not the court. And there was substantial evidence to support that and I think that's been appealed. And the matters that you argue now, if they had been applicable at the time, they should have been brought up then, but they're too late now. They might not even have resulted in something different at the time because, again, you've got somebody telling you what someone said something different than what they testified to and there's lots of motives for people to step outside a courtroom and tell something. I've seen people that got convicted here and they

step out of the courtroom and say what happened, oh, nothing, free to go. So there's a big difference-in what you tell under oath in a courtroom a lot of times and what you tell someone on the streets, especially if you don't want to be bothered and you don't want to talk about it. So I appreciate the time you put into it and I'm sympathetic with Ms. Macy but I'm sworn to uphold the law as I believe it to be and I'm afraid that's the case.

FURTHER SAITH NOT.

(SIGNATURE NOT REQUESTED)

STATE OF KENTUCKY

SCT.

COUNTY OF HOPKINS

I, Sheila Burton, a notary public within and for the state and county aforesaid, do hereby certify that the foregoing pages represent the preliminary hearing held in the above styled case.

This transcript is not certified as to accuracy of content, as no court reporter was present in person, and same is produced from a taped recording of the hearing. The parties present at said taking are as set forth on page 1 hereof. Given under my hand and seal of office this 6th day of January, 2003. My commission expires July 8, 2004.

S/ Sheila Burton

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2003-SC-809-D

COURT OF APPEALS
NO. 2003-CA-00 1212-DR
On Appeal from
HOPKINS CIRCUIT COURT
CASE NO. 02-XX-00010
HONORABLE CHARLES W. BOTELER, JR., JUDGE
On Appeal from
Hopkins District Court
Honorable Carl U. Hurst, Judge
District Court Action No. 00-M-O 1792

SHARON MACY MOVANT

V. MOTION FOR DISCRETIONARY REVIEW

COMMONWEALTH OF KENTUCKY RESPONDENT

.....

Comes the Movant, Sharon Macy, (hereinafter Macy) by counsel, and moves the Kentucky Supreme Court, pursuant to CR 76.20, for discretionary review of the Order of the
Kentucky Court of Appeals, entered September 12, 2003, denying Discretionary Review of a Hopkins Circuit Court appellate decision entered on May 14, 2003.

(a) The name of the Movant is Sharon Macy, represented by C. Mike Moulton, Moulton & Long PLLC, 58 Public Square, Elizabethtown, Kentucky 42701; the Respondent is the Commonwealth of Kentucky, Hopkins County Attorney's Office, represented by Robert Moore, Hopkins County Attorney, and Lisa Watson, Assistant Hopkins County Attorney, 25 East Center Street, Madisonville, Kentucky 42431 and Kentucky Attorney

General Albert B. Chandler III, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky, 40601-8204.

(b) The order sought to be reviewed is an Order of the Kentucky Court of Appeals entered September 12, 2003, denying Discretionary Review of a Hopkins Circuit Court appellate decision entered on May 14, 2003.

(c) A supersedeas bond was not executed in this case.

(d)(i) The material facts:

Macy was a high school teacher at South Hopkins Middle School. On November 1, 2000, Macy was leaving the school grounds of South Hopkins Middle School after completion of her work day when she found members of the Boys Basketball Team sitting outside the school without supervision. Macy instructed the boys to go back inside the school's gymnasium. At that time, she was informed by the school's custodian, Charles Camplin, that the boys had been disrespectful to members of the Girls Basketball Team which were practicing in the gym. Macy proceeded to lecture the boys about their actions and then Macy left the school grounds. The nine boys to whom Macy spoke later claimed Macy threatened to kill them on two separate occasions during her lecture. A criminal complaint was taken by one of the boy's parents and Macy was charged with nine counts of terroristic threatening. A trial was held on April 4 and 5, 2001 at which time a Hopkins County jury found Macy guilty of nine counts of terroristic threatening. The jury recommended a fine of Five Hundred Dollars ($500.00) on each Count. The fine was suspended and Macy was placed on probation for a period of two years, or until April 5, 2003.

Pertinent to the present motion is the testimony of two of the witnesses in the criminal trial: Trevor Duncan and Albert Jackson. These boys were two of the nine allegedly threatened by Macy and were members of the boy's basketball team at South Hopkins Middle School. Both testified at the criminal trial. Albert Jackson testified, "a little

into the conversation, she (referring to Macy) told us that if we was picking on the girls or teasing or like that, she would kill us because we we're always the ones that talk about the girls; and that we were the ones who were always talking about the girls, and she was getting tired of it." Albert Jackson also testified Macy made the threat on two occasions and that he took Macy seriously. On cross-examination Albert Jackson gave conflicting testimony when he stated, "But, I don't remember her saying she was going to kill us five kids or whatever. I don't remember her saying that specifically. But I remember her saying other stuff"

Trevor Duncan, testified that, "She said that she would kill us if we made fun of the girls." At the criminal trial, Trevor Duncan denied telling others that he did not hear any death threats from Ms. Macy.

The convictions were appealed to the Hopkins Circuit Court, case no. 01-XX-0002, by Macy's attorney at that time, C. Mark Blankenship. The Circuit Court affirmed the convictions. Blankenship then filed a motion for Discretionary Review of the Circuit Courts affirmation of the conviction to the Kentucky Court of Appeals, case no. 2002-CA-46. That motion was denied on March 22, 2003. Precipitated by newly discovered evidence, two post conviction motions were later filed in the Hopkins District Court. A RCr. 11.42 motion, styled as a "Motion To Set Aside Judgment", was filed by C. Mark Blankenship on behalf of Macy on or about September 10, 2002. On or about November 13, 2002, a Motion For New Trial was filed on Macy's behalf by another attorney, W. David Rye.

Rye's motion, while not brought under a specific Rule of Criminal Procedure, amounted to a request for new trial under RCr 10.02, RCr. 10.06 and CR 60.02. As stated, Blankenship styled his Motion to Set Aside Judgment as a motion filed pursuant to RCr 11.42. The argument in both of these motions was that new evidence had been discovered since trial that would tend to exculpate Macy. Blankenship's RCr. 11.42 motion also alleged grounds that the

Commonwealth failed to disclose potentially exculpatory evidence. This evidence was in the form of notes taken by, and in the possession of, an Assistant School Superintendent. These notes were later destroyed.[1]

Both Rye and Blankenship relied on the tendered Affidavit of Kendra Young in which she stated that Albert Jackson, one of the witnesses against Macy at the criminal trial whose testimony is discussed above, informed Young he was not present at the time Macy made the alleged threats. Responding to a question as to whether or not Albert Jackson stated the events ever happened, Young said, "he didn't say that it didn't, he is just saying that, because he, like, he wasn't there, he, like, he wasn't even in the gym or anything when all of it happened, he said." When questioned further, Young stated Albert Jackson told her he was not in the gym on the day that Macy was allegedly accused of threatening to kill nine students. Young, who was not a witness at the criminal trial, provided her Affidavit on August 7, 2002.

Rye, in support of his motion, also put before the District Court the Affidavit of Cassi Ezell. Ezell's affidavit concerned Trevor Duncan, another witness whose testimony is discussed above. Ezell stated Trevor Duncan stated he never heard Macy utter the alleged death threats and that he did not think the issue surrounding the death threats allegedly made by Macy would be going on this long. Ezell, who was not a witness at the criminal trial, provided her Affidavit on October 8, 2002.

Both motions were briefed and a hearing was held in front of District Court Judge Carl Hurst on November 22, 2002. (Transcript of hearing attached as Exhibit D) After the hearing, in which no witnesses were called, nor was there any participation by the Commonwealth, Judge Hurst denied both motions on grounds "explained on the record." (Exhibit C

1. Since newly discovered evidence is not an issue upon which RCr. 11.42 relief can be granted, the RCr. 11.42relief requested is properly grounded on the Commonwealth's failure to provide exculpatory evidence issue. *Polsgrove v. Commonwealth,* Ky.App., 436 S.W.2d 776, 780 (1969)

Record transcript attached as Exhibit D) That denial resulted in an appeal being filed in Hopkins Circuit Court. The Appeal was briefed and oral arguments were heard in the case on May 2, 2003. The Circuit Court affirmed the decision of the District Court on May 14, 2003. (Exhibit B) A Motion for Discretionary Review was filed in the Kentucky Court of Appeals, case number 2003-CA-001212-DR, on June F' 2003 That motion was denied in an Order of the Court of Appeals dated September 12 2003. (Exhibit A) This Motion for Discretionary Review is filed as a result of the Court of Appeals Order.

(d)(ii) The questions of law involved:

Obviously, the plain language of CR 76.20 makes the decision of the Court of Appeals to deny review of a Circuit Court appeal one totally within their discretion. Just as plainly, CR 76.20 allows the appellate courts to grant discretionary review when there are special reasons. While certainly not clearly defined, those special reasons include ones where the lower court's ruling was "clearly erroneous or would create a manifest injustice." Phillips, Kurt, Kentucky Practice Vol. 7, p. 660, (5 ed. 1995) While it cannot be said the Court of Appeal's denial of discretionary review was clearly erroneous as a matter of law, Macy argues it does create a manifest injustice as addressed below in section (d)(iii).

Had the Court of Appeals granted discretionary review, one question of law they would have addressed concerns whether or not the District Court, and the Circuit Court in its affirmation of the District Court, erred in not vacating Macy's convictions and granting her a new trial based on newly discovered evidence pursuant to RCr. 10.02, RCr. 10.06 and CR 60.02. Involved in this issue is whether the motions were time barred under the specific rule provisions which normally set a time limitation of one year for filing motions regarding newly discovered evidence. However, both RCr. 10.06 and CR 60.02 have saving provisions which allow the issue of new evidence to be presented at a time later than one year, "for good cause"

under R.Cr. 10.06 (1) or for any "reason of an extraordinary nature justifying relief' under CR 60.02 (f). *Brown v. Commonwealth,* Ky. 932 S.W.2d 359, 361-2, (1996) internal cites omitted Since the Commonwealth did not participate in the hearing or challenge the motion as time barred, and Judge Hurst did not address the issue in court or in his decision, the limitations defense is precluded to the Commonwealth.

Another question of law the Court of Appeals would have addressed is whether the District Court, and the Circuit Court in its affirmation of the District Court, erred in not granting relief pursuant to RCr. 11.42 and/or in not holding the evidentiary hearing envisioned in *Commonwealth v. Gilpin,* Ky.App., 777 S.W.2d 603 (1989); *Coles v. Commonwealth,* Ky.App. 386 S.W.2d 465 *(1965).* As stated in the Circuit Court's Order affirming, "an evidentiary hearing would have made this issue clearer." While the Commonwealth addressed the issue in its pleadings which stated they were not aware of the notes, the Court's analysis begs the question. If exculpatory evidence is within the Knowledge of an agent of the Commonwealth, the prosecuting authority is deemed to have knowledge of the information. *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *United States v. Argus,* 427 U.S. 150, 92 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) When exculpatory evidence is within the knowledge of an agent of the Commonwealth, it is contingent upon the prosecuting authority to disclose the information to the defendant. An evidentiary hearing would have helped resolve any questions concerning this issue and would also have been appropriate and helpful in addressing the motion pursuant to RCr. 10.02, RCr. 10.06 and CR 60.02.

(d)(iii) The specific reasons why the opinion should be reviewed:

The newly discovered evidence in this case was not disclosed until over a year after the trial. The newly discovered evidence involved perjured testimony of two of

the primary witnesses to the prosecution of Macy. While *Foley v. Commonwealth,* Ky., 55 S.W.3d 809, 816 (2001) makes it clear that newly discovered evidence "which is only impeaching in nature" did not warrant a new trial, the evidence in this instance goes far beyond being merely impeachment. A major portion of Macy's defense at trial was to show collusion between the boys to manufacture testimony. Any affirmative evidence showing such collusion between the witnesses directly supported Macy's defense that the boys banded together to protect their basketball coach from trouble due to his leaving them unsupervised. The newly discovered evidence also affirmatively supported Macy's defense that the entire scheme of the boys went further than they envisioned and snowballed out of their control. Evidence from disinterested witnesses which supports the theory of a defendant's otherwise unsupported defense, would likely result in a different verdict. In such cases, granting a new trial and allowing the presentation of newly discovered evidence is appropriate to assure justice and, conversely, to avoid manifest injustice. *Dolan v. Commonwealth,* Ky.App. 468 S.W.2d 277 (1971) At the very least, an evidentiary hearing should have been held to determine the validity and strength of the new evidence. The admission of an accuser, albeit to a third party, that he was not even present at the event, so strongly supports and corroborates Macy' s position of a testimonial conspiracy that it undoubtedly would have effected the outcome of the trial. As stated, an evidentiary hearing where the judge could directly evaluate the testimony is the only way to properly determine the newly discovered evidence's weight and probative impact.

A hearing should also have been granted in order to establish whether or not there was indeed exculpatory evidence, the significance of that evidence, the propriety of the actions of destroying the evidence and, most importantly, to evaluate the prejudicial effect of the failure to produce the evidence. The denial of the evidence could even rise to the

level of a "constitutional error of the first magnitude and no showing of want of prejudice would cure it." *Commonwealth v. Gilpin,* Ky.App., 777 S.W.2d 603, 606 (1989) citing *Davis v. Alaska,* 415 U.S. 308,318,94 S.Ct. 1105, 1111,39 L.Ed.2d 347, *355* (1974) "A constitutional error which contributes to conviction is presumed to be prejudicial unless it was harmless beyond doubt." *Gilpin* at 606, internal cites omitted Absent an evidentiary hearing, there was no way to determine the constitutional and prejudicial impact of the evidence. Macy believes the evidence would make a substantial difference in her case and believes it was error not to grant a new trial on this issue alone. At the very least, an evidentiary hearing should have been held.

Macy lost her teaching job[2] as a result of the trial's outcome. She is also in an administrative battle to try and save her teaching certificate. While a fine or probation may, to some individuals thinking, be minor in comparison to the possible penalty Macy could have received, the resulting impact on her career and her life are huge. The ripples from the conviction go much further than the fine or the two years probation. For the Court of Appeals not to review the decisions of the Circuit and District court in this case amounts to a manifest injustice. Macy should be allowed to explore every substantive avenue to proof her innocence. The Court of Appeals should have granted discretionary review to ensure none of those avenues were prematurely closed to Macy.

(e) The Movant does not have a petition for rehearing or a motion for reconsideration pending in the Court of Appeals.

(f) To the knowledge of the Movant, no other party to this proceeding has a petition for rehearing or a motion for reconsideration pending in the Court of Appeals.

2. A Tribunal hearing was held regarding Macy's termination. The outcome of that hearing is presently before this court on a motion for discretionary review, case number 2003-SC-15-D, presently being held in abeyance pending final determination of *Fankhauser v. Cobb,* 2002-SC-368-DG.

Copies of the September 12, 2003 Order of the Kentucky Court of Appeals, (Exhibit A), the Order of the Circuit Court (Exhibit B), the Order of the District Judge as cited on the Court Docket Sheet Opinion (Exhibit C) and the transcript of the record referred to by the District Court in its Docket Sheet notation (Exhibit D) are attached pursuant to CR 76.20(4).

Respectfully Submitted,

S/ _____

C. Mike Moulton
Moulton & Long, PLLC
58 Public Square
Elizabethtown, KY 42701
(270) 766-1800
Attorney for Movant Macy

CERTIFICATION

I hereby certify that the original and ten (10) copies of the foregoing Motion for Discretionary Review was on October 10, 2003, mailed registered mail to the Clerk of the Supreme Court of Kentucky, Capitol Building room 209, Frankfort, Kentucky 4060; and a true and correct copy of the foregoing Motion for discretionary Review was mailed U.S. mail to the Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601,Counsel for Respondent, Robert Moore, Hopkins County Attorney, and Lisa Watson, Assistant Hopkins County Attorney, 25 East Center Street, Madisonville, Kentucky 4243 1 and Kentucky Attorney General Albert B. Chandler III, Office of the Attorney General. 1024 Capital Center Drive, Frankfort, Kentucky, 4060 1-8204, and Hopkins County Commonwealth's Attorney David Massamore, 52 F. Broadway, Madisonville, KY 4243 1 and the Honorable Circuit Judge Charles W. Boteler. Jr., 30 Main Street, P.O. Box 964, Madisonville, KY 42431.

(The documents referred by reference to in this motion have not been included)